Office of the Health Insurance Commissioner

Special Legislative Commission to study the feasibility of enacting legislation to empower primary care providers to jointly negotiate with insurers

Meeting Minutes

November 27, 2007

"The purpose of the Commission shall be to develop recommendations for strengthening the role of the state's primary care providers within the health system, including, legislative recommendations regarding the creation of a state- authorized and state-monitored mechanism allowing primary care providers to jointly negotiate health care provider and participation agreements with health insurers."

1. Attendance:

Present: Stephen D'Amato M.D., Maureen G. Glynn, David Ashley M.D., Ana Novias.

Invited Guests: Don Wineberg, Jeffrey Chase-Lubitz

OHIC Staff: Patricia Huschle

2. Introductions/Minutes approved

Pat Huschle welcomed the group. The members of the commission approved the minutes.

3. Antitrust background and State Action Immunity

Steven Snow of Partridge, Snow and Hahn, who attended the meeting at the request of Blue Cross, gave the commission members a brief background on antitrust law. He informed the group that antitrust laws are designed to protect the consumers by safeguarding competition. Antitrust laws prohibit competitors (physicians) from getting together to discuss price. He stated that antitrust laws do not prohibit discussion among competitors for common concerns other than price. He stated that the U.S. Supreme Court has allowed for providers to collectively discuss fees with health plans if the state actively supervises the activity.

4. Brief History of State Action Exemption Legislation in Rhode Island

Jeffery Chase-Lubitz a lawyer who represents the Rhode Island Medical Society, presented information on the history of State Action exemption legislation in Rhode Island. He indicated that the AMA pushed this legislation in a number of states in 2000 on behalf of smaller provider practices that believed they were disadvantaged when negotiating with insurance companies on managed care contracts. The legislation drafted in Rhode Island in 2000 created a structure where groups of unrelated physicians could, with the approval of the Attorney Generals office, join together to negotiate with insurers. The Attorney General's office would monitor the process and approve the outcome of the negotiation. This legislation did not presume that it met State Action exemption requirements.

This legislation did not pass. In 2001, then Attorney General Sheldon Whitehouse advocated for a different bill that separated these kinds of negotiations into two classes. The first class allowed plans and providers to meet to discuss non-fee issues common to all whose results would apply more broadly to the market as a whole. The second class allowed for specific groups of physicians to join together to discuss fees- the outcome of which would benefit that group alone. In either scenario, the physicians would need to apply to the Attorney General and the court would issue an order approving the class one or class two negotiation. The Attorney General's office would shepherd the process and the final contract would be sent to the Supreme Court, who would approve the agreement. This was both a costly and time-consuming process. Mr. Chase-Lubitz clarified that the "class one" negotiations may not even be required if the parties were discussing non-fee related issues like uniform coding or credentialing, which are permitted under antitrust law.

Legislation introduced in 2002 and 2003 was similar. In 2004, the proposed legislation included several modifications. It included the Office of the Health Insurance Commissioner oversight of the negotiations and required binding arbitration in the event that the parties are unable to come to a mutually agreeable outcome. The Attorney General's office would still review the physician group's application, and would see that an economic analysis is completed (by an outside party) to determine potential market impact prior to allowing the physicians to discuss any fee details. Mr. Chase-Lubitz

clarified that Medicare, Medicaid, RItecare plans and ERISA plans would be exempt from this negotiation process. This legislation passed the house, but failed to pass the senate.

5. Other State Action exemption statutes and effects

Don Wineberg, who represents Neighborhood Health Plan and health care providers, provided the Commission some additional antitrust details and information regarding State Action exemption legislation in other states. Don told the Commission that he believes we have three alternatives; 1) report to the General Assembly that we believe State Action exemption based legislation for primary care provider negotiations is inadvisable from a policy perspective and do not recommend it; 2) recommend state action exemption legislation that permits the parties to negotiate but does nothing if the parties fail to agree; or 3) recommend state action exemption legislation that allows negotiations and either requires binding arbitration or provides an alternate mechanism that creates an economic risk for the negotiating parties if they fail to agree.

Mr. Wineberg told the Commission that we need to be aware of per se violations of antitrust law. These include price fixing, boycotts (competing providers cannot jointly agree to terminate plan participation), tying arrangements and market allocation agreements. In 1996 the Department of Justice and Federal Trade Commission issued Health Care Antitrust Guidelines to clarify how providers may join together for negotiations with health plans. These guidelines

remain in effect and violating them can have severe consequences.

In certain situations providers may jointly negotiate with health plans. Providers can form an integrated group practice, like Coastal, that is one legal entity. Providers may also create a legitimate joint venture for purposes of entering into a risk based (capitated) fee arrangement, but not for fee-for-service arrangements. Providers that are "clinically integrated" may also jointly negotiate, but "clinical integration" is very complicated to prove and health plans are not inclined to negotiate with these types of groups unless Federal authorities have recognized them as clinically integrated, due to antitrust concerns.

These limitations on physician negotiations have led some states to enact State Action exemption legislation, which permits behavior that would otherwise be illegal. Between 1999 and 2003 many States considered legislation to allow physicians to collectively negotiate fee-for-service arrangements with payers. New Jersey, Texas and Alaska have passed State Action exemption laws that allow fee-based negotiations. The Texas law has since expired.

Each State law included varying processes for certifying the bargainers and approving results of the negotiation. None of the statutes either encouraged or compelled payers to bargain. Indeed, the Texas and Alaska laws prohibit boycotts if negotiations fail. National experience has shown that payers have not been interested

in negotiating under these systems and none of the enacted statutes has resulted in any contracts as far as Mr. Wineberg could determine.

Mr. Wineberg offered the following concluding statements:

The enacted statutes have changed nothing in their respective States.

If the Commission recommends legislation that only allows negotiations to occur, he believes it is unlikely the Rhode Island experience would be any different than these other states.

If the Commission recommends legislation that affirmatively encourages or requires plans to bargain, the payers would most likely oppose the legislation. Legislative methods for encouraging or requiring payers to bargain, include requiring negotiations and binding arbitration, rate setting review or court review in the event of an impasse; or allowing providers to boycott (collectively de-participate) after impasse.

6. Health Plans Comments

Steven Snow spoke in behalf of Blue Cross and indicated that Blue Cross has recently increased primary care provider reimbursement. He stated that he believes that market forces work in healthcare. Any legislation that allows for increasing provider rates will have an impact on medical insurance premiums, possibly increasing the

number of uninsureds.

Jason Martiesian of UnitedHealthcare indicated that United as well has implemented a recent primary care fee increase and would prefer to work with the provider community on their issues outside of a legislative process.

Ken Pariseau of Neighborhood Health Plan indicated that although the State Action exemption would exclude RItecare, any legislation that ultimately increases the uninsured in the state would be problematic for the local community health centers, which are already overburdened with caring for the uninsured.

7. Public Comment

The public was invited to make comment. Brian Quigley from Americas Health Insurance Plans asked that the Commission look for recommendations other than State Action exemption and indicated that anything that were to pass that compelled the plans to negotiate would probably be overturned as an antitrust violation.

8. Next Meeting

The next meeting of the Commission is Friday December 7th, 8:30 am to 10:30 am. The Commission will be evaluating the information received at this meeting and will being to formulate our recommendation.